Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BERNIE LAZAR HOFFMAN, A.K.A. TONY ALAMO,

Petitioner,

—v.—

UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Petitioner respectfully requests that the Court, without deciding the underlying merits, review the following questions concerning the "debatable among reasonable jurists" standard set forth in *Barefoot* v. *Estelle* and in 28 U.S.C. § 2253(c)(2):

1. Did the United States Court of Appeals for the Sixth Circuit ("the court of appeals") and the United States District Court for the Western District of Tennessee ("the district court") err in denying the petitioner's application for a certificate of appealability in a proceeding brought under 28 U.S.C. § 2255?

2. Did the district court and the court of appeals err in denying the certificate of appealability even though the district court instructed the government to respond to the § 2255 motion, contrary to the usual rule of the Second Circuit to grant certificates of appealability in the same circumstances?

3. Did the district court and the court of appeals err in determining that the petitioner failed to make a "substantial showing," under *Barefoot* v. *Estelle*, 463 U.S. (1983), and 28 U.S.C. § 2253(c)(2), of the denial of a federal constitutional right under *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *United States* v. *Bagley*, 473 U.S. 676 (1985)?

4. Did the district court and the court of appeals err in applying a merits-determination standard instead of the "debatable among reasonable jurists" standard in reaching their determination that the petitioner failed to make a substantial showing of the denial of a federal constitutional

right?

5. What are the specific criteria that courts should apply in determining whether an issue is debatable among reasonable jurists?

6. Should the Court exercise its certiorari power to grant non-plenary supervisory review with respect to denials, by the federal courts, of certificates of appealability? Alternatively, should the Court refer such petitions to a Circuit Justice?

PARTIES TO THE PROCEEDINGS BELOW

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Bernard Lazar Hoffman, publicly known as Pastor Tony Alamo ("Alamo"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The April 28, 2000, order of the United States Court of Appeals for the Sixth Circuit denying petitioner's application for a certificate of appealability is unreported (App. A, *infra*, 1a-2a). The September 30, 1998 order of the United States District Court for the Western District of Tennessee directing the government to respond to petitioner's motion for a new trial pursuant to 28 U.S.C. § 2255 is unreported (App. B, *infra*, 3a-4a). The May 13, 1999, order of the district court denying petitioner's motion for discovery and a new trial pursuant to 28 U.S.C. § 2255 and declining to issue a certificate of appealability is unreported (App. C, *infra*, 5a-26a). The August 11, 1999, order of the district court denying petitioner's motion for reconsideration of the district court's order of May 13, 1999 is unreported (App. D, *infra*, 27a-35a).

JURISDICTION

Petitioner filed a motion in the district court under 28 U.S.C. § 2255, seeking to set aside his convictions for violating 26 U.S.C. §§ 7203 and 7206. Petitioner also sought an order permitting him to undertake limited discovery in support of his motion.

On May 13, 1999, the district court denied petitioner's motion and refused to certify the case for appeal. On August 11, 1999, the district court denied petitioner's motion for reconsideration. On October 5, 1994, petitioner timely filed a notice of appeal, and thereafter applied to the United States Court of Appeals for the Sixth Circuit for a certificate of appealability. On April 28, 2000, the court of appeals denied the application in a summary order.[1/]

The jurisdiction of the Court to review the decision of the court of appeals is invoked under U.S.C. § 1254(1).[2/]

STATUTES INVOLVED

The relevant statutes are reproduced in App. E, *infra*, 36a-40a.

STATEMENT OF THE CASE

Petitioner Alamo is the pastor of Music Square Church, a

[1/] Although the Petitioner has completed his sentence, that fact does not moot his § 2255 motion. *See Carafas* v. *LaVallee*, 391 U.S. 234, 238 (1968).

[2/] This Court has held that it has jurisdiction to review denials of certificates of appealability under 28 U.S.C. § 1254(1). *Hohn* v. *United States*, __ U.S. __, 118 S.Ct. 1969, 1978 (1998) (overruling a portion of *House* v. *Mayo*, 342 U.S. 42 (1945)). In overruling *House*, the Court explained that its "normal function" included "reviewing possible misapplications of law by the courts of appeals." *Id.*, at 1977. Justice Souter's concurring opinion also explicitly indicated that the Court had "jurisdiction to reverse erroneous denials of certificates of appealability." *Id.*, at 1978. In addition, the Court noted that it frequently had reviewed such denials. *See Hohn*, 118 S.Ct. at 1978 (citing various cases).

religious organization that shelters and rehabilitates homeless individuals and addicts, operates evangelical centers, and disseminates religious information in several states. In 1993, Mr. Alamo was charged with willfully filing a fraudulent income tax return for 1985 in violation of 26 U.S.C. § 7206 (Count One);[3] and with willfully failing to file income tax returns for 1986, 1987 and 1988 (Counts Two through Four) in violation of 26 U.S.C. § 7203.[4]

Following a three week criminal trial in May-June 1994, the jury was initially unable to reach a decision. The jury sent two notes to the district court during the second day of deliberations stating it was deadlocked on all four counts. The district court instructed the jury to continue its deliberations. The following day, a guilty verdict was reached as to all counts. The district court sentenced Mr. Alamo to the maximum sentence of six years in prison, and fined him $210,000.

Three years after the trial, in 1997, while Mr. Alamo's conviction was on direct appeal, he became aware that the government had withheld information it was obligated to disclose under *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *United States* v. *Bagley*, 473 U.S. 676 (1985). The information

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[3] The elements of a § 7206 offense are: 1) making and signing a materially false return; 2) knowing the return substantially understates the gross income for the tax year in question; 3) signing return under penalty of perjury; and 4) willfulness.

[4] The elements of a § 7203 violation are: 1) defendant received gross income greater than the filing requirement for the tax year in question; 2) defendant did not file a return; and 3) willfulness.

was revealed during discovery and depositions conducted in a civil action initiated in 1996 by Music Square Church against the United States in the Court of Federal Claims.[5] In the course of examining documents obtained from the IRS, the Church's counsel read an affidavit signed in 1991 by Carey Miller, who, together with his brother Robert, was one of the government's two key witnesses in the 1994 criminal trial. Carey had submitted the affidavit during a prior (1991-1992) civil lawsuit[6] in which Mr. Alamo was not a party, but which involved a different organization affiliated with the religious movement that follows Mr. Alamo's teachings. The 1991 affidavit stated, *inter alia*, that both Carey and Robert had submitted Form 211 reward applications to the IRS in 1990. Yet the government, during the 1994 criminal trial, explicitly elicited, from Robert Miller, Carey Miller, and two IRS agents, testimony that neither of the brothers had made any deals with the IRS.[7] Having read the 1991 affidavit, the Church's

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[5] *Music Square Church* v. *United States*, Court of Federal Claims, No. 96-396T.

[6] *Tony and Susan Alamo Foundation* v. *United States*, Civ. Action No. 3-90-901 (M.D. Tenn.). Carey and Robert Miller filed an intervenor's complaint in this suit.

[7] *See* 26 U.S.C. § 301.7623-1: Reward for information relating to violations of internal revenue laws. As the reward consists of 10 % of the sum of the judgment, each of the two witnesses may have been eligible to receive $21,000.00 (the two witnesses' whereabouts are currently unknown, and to this date, the government has failed to locate the reward applications). The newly discovered evidence, unknown to Mr. Alamo's defense attorney in 1994, would have been highly significant to

counsel, in October, 1997, deposed Larry Howlett, one of the original investigating IRS agents, who now (contrary to his testimony at the 1994 trial) distinctly recalled that the two witnesses had submitted reward applications:

Question: Did Carey Miller submit a Form 211 form to the Internal Revenue Service?

Howlett: Yes.

Question: Did Robert Miller submit a Form 211 to the Internal Revenue Service?

Howlett: Yes.

Question: Did you inform [Prosecutor] Belcher of this information [regarding submission of the Form 211s]?

Howlett: Yes.

It was, of course, too late to raise this issue in the direct appeal of Mr. Alamo's conviction. After the court of appeals affirmed Mr. Alamo's conviction, *see United States* v. *Hoffman*, 124 F.3d 200 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 725 (1998), Mr. Alamo filed a motion under 28 U.S.C. § 2255 seeking to set aside his conviction and for a new trial, and requesting additional discovery. Mr. Alamo argued that his due

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Mr. Alamo's defense, for it could have been used to cast doubt on the motivations of the government's key witnesses. In fact, the government relied heavily on testimony which portrayed Mr. Alamo as a zealous hater of the Internal Revenue Service. The key proponents of this incendiary testimony were Robert Miller and Carey Miller.

process rights had been violated by the failure to comply with the requirements imposed by *Brady* and *Bagley* and that his conviction had been obtained through perjured testimony elicited from the Miller brothers and the IRS agents in violation of *United States* v. *Agurs*, 427 U.S. 103 (1976). On September 30, 1998, the district court ordered the government to file a response to the § 2255 motion (App. B, *infra*, 3a-4a). In its response, the government argued that it had been unable to locate the reward applications and that in any event the prosecutor was not aware – *i.e.*, he had forgotten – that such applications had been made when he elicited contrary testimony during the criminal trial.

Following the exchange of briefs and appendices, the district court acknowledged that the newly discovered evidence indicated, at a minimum, that the government failed to turn over information that would have allowed Mr. Alamo to demonstrate that the two brothers "believed" they had filed reward applications, and that such a belief "could tend to show bias" (Order of May 13, 1999, App. C, *infra*, 14a). Nonetheless, the court observed, *sua sponte*, that a review of the docket sheet of the earlier (1991) civil case revealed that Mr. Alamo's criminal defense attorney had been "involved" in the civil case, and that another attorney who had worked on the civil case also provided some files "during the initial stages of the Defendant's criminal prosecution" (*id.* at 15a). Since some of the evidence concerning the reward applications (*i.e.*, the 1991 affidavit of Carey Miller, but not the 1997 deposition testimony of Agent Howlett) was part of the record in the civil case, the court denied Mr. Alamo's motion, for "there is no

Brady violation if the defense *knew of the evidence* at the time of the trial" (*id.* at 16a) (emphasis added).

Mr. Alamo moved the district court to reconsider its decision. In support of the motion, Mr. Alamo's criminal defense attorney submitted a supplemental affidavit, in which he stated upon oath that his intervention in the civil case (in October 1991) was brief and had concerned an unrelated matter; that he had never seen or known of the 1991 affidavit, which had never been served upon him; and that it was unconceivable to him that if Mr. Alamo had been aware of the affidavit's existence at the time of the 1994 criminal trial, he would not have informed him.

The district court denied the motion to reconsider, because, in the court's view, Mr. Alamo had still failed to demonstrate that the evidence was not "available to the defendant from another source." Thus, the court's view was now no longer that the defense actually "knew of" the evidence by virtue of having briefly intervened on a collateral issue in the earlier civil case; rather, the court now held that the mere physical *possibility* of obtaining the documents through such "involvement" sufficed to meet the standard for the "available from another source" exception to the *Brady* doctrine (Order of August 11, 1999, App. D, *infra*, 33a-34a).

In its Order of May 13, 1999, the district court – despite the fact that it had found the § 2255 motion to be of sufficient moment to require the government to respond – also stated that it would refuse to grant Mr. Alamo a certificate of appealability because petitioner "cannot present a question of some substance about which reasonable jurists could differ" (App. C,

infra, 24a). (In its denial of Mr. Alamo's motion for reconsideration, the court did not examine the question of whether a certificate of appealability should be granted.) Petitioner then applied for a certificate of appealability from the court of appeals. Petitioner argued that the district court had given a broader application to the "available from another source" and "due diligence" exceptions to the *Brady* doctrine than had either the Sixth Circuit or, in fact, any other circuit. Petitioner also argued again that Mr. Alamo's conviction had been obtained through perjured testimony. Nonetheless, on April 28, 2000, in a six-line summary order, the court of appeals denied the application "because Hoffman failed to make a substantial showing of the denial of a federal constitutional right" (App. A, *infra*, 1a-2a).

Petitioner now requests that the Court, without deciding the underlying merits of the § 2255 motion, reverse the denial of the certificate of appealability so as to allow Mr. Alamo to exercise his substantive right to contest, in the court of appeals, the legality of the district court's application of the "available from another source" exception to the *Brady* doctrine.

REASONS FOR GRANTING THE WRIT

This case presents serious and substantial questions concerning the application of the certificate of appealability provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. 104-518 (April 24, 1996). The courts below denied petitioner an opportunity to appeal his § 2255 motion for a new trial based upon newly discovered evidence that the trial was infected by false and misleading, if not perjurious, testimony of key government witnesses, where:

(1) the government adduced such testimony; (2) the government's counsel in effect claimed to have forgotten his own knowledge of events proving the testimony was false or misleading; (3) the district court acknowledged that the undisclosed evidence "could tend to show bias" on the part of the key government witnesses; (4) the trial was closely contested, with the jury twice having issued notes stating it was deadlocked; indeed, the trial judge stated after the verdict, "I don't think it was clear to anybody until the jury came back how this matter would be resolved"; and (5) the district judge considered the motion under § 2255 to be of sufficient moment to require the government to file a full response to the motion.

The requirement of a certificate of appealability was not intended and should not be applied to prohibit potentially meritorious appeals such as the appeal petitioner sought to undertake here. Under standards applied by at least one other circuit, and perhaps others, petitioner certainly would have been permitted to present his appeal on plenary review to a court of appeals. The Court should grant certiorari to resolve the conflict in the circuits; to provide further guidance and criteria to the lower federal courts to insure that the right to appeal under AEDPA not be unfairly and unduly restricted; and to establish supervisory review by this Court, under its certiorari powers and without need of plenary review of the merits, of improper denials of certificates of appealability.

I. The District Court And The Court of Appeals Applied an Inappropriately High Standard in Rejecting The Application For a Certificate of Appealability

AEDPA requires that a certificate of appealability be

granted before a prisoner may appeal the denial of a motion made under 28 U.S.C. § 2255. Thus, since 1996, not only a state prisoner, but any prisoner, whether convicted in a state or a federal court, must meet a threshold standard before he can have his case reviewed by a federal appellate court. The threshold is met, and the certificate must issue, if "the applicant has made a *substantial showing* of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (emphasis added).

The Court recently held that "[e]xcept for the word 'federal,' § 2253 is a codification of the [certificate of probable cause] standard announced in *Barefoot* v. *Estelle*, 463 U.S., at 894 [1983]." *Slack* v. *McDaniel*, __ U.S. __, 120 S.Ct. 1595 (2000). The Court indicated that "[t]o obtain a COA under § 2253, a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that, under *Barefoot*, includes showing that *reasonable jurists could debate* whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 1603-04 (emphasis added) (quoting *Barefoot*, 463 U.S. at 893 n.4). *See also Lozada* v. *Deeds*, 498 U.S. 430, 432 (1991) (per curiam) (reasserting *Barefoot* standard and reversing court of appeals' denial of certificate of probable cause). In setting forth the "reasonable jurists" standard, *Barefoot* warned that the standard was not to be confused with a determination on the merits. *See id.* at 893 n.4. *Barefoot* further explained that "Congress established the requirement that a prisoner obtain a certificate of probable cause [now a certificate of appealability] *in order to prevent frivolous appeals* . . . ." *Id.* at 892 (emphasis added).

In this case, the district court concluded that "for the reasons discussed in the body of this order, movant's claims are clearly without merit and he cannot present a question of some substance *about which reasonable jurists could differ*" (App. C, *infra*, 24a) (emphasis added). The italicized words parrot the standard set forth in *Barefoot* and reiterated in *Slack*. In purporting to apply this standard, however, the district court appears to have confused its own determination regarding the merits of Mr. Alamo's case, with the objective "debatable among reasonable jurists" standard. The "reasons discussed" in the court's order, of course, are precisely the reasons that inform the court's determination on the merits: namely, Mr. Alamo's counsel must have had access to the undisclosed evidence during his "involvement" in the earlier trial. Nowhere, moreover, did the court assert that Mr. Alamo's claims were "without merit" in the sense of being actually *frivolous*; and nowhere did the court offer any explanation why reasonable jurists could not offer competing legal theories and solutions regarding the issue of whether the court erred in applying certain exceptions to the *Brady* doctrine to the facts before it. As a result of the district court's failure to apply the "debatable among reasonable jurists" standard (on which see further *infra*, Point II), petitioner has been denied his substantive right to appeal a *debatable* decision regarding the violation of his due process rights.

The single case the district court relied on in reaching its conclusion regarding the inapplicability of *Brady* involved a situation where the prosecution had previously disclosed relevant impeachment evidence during a detention hearing *in*

the presence of defendant and with the opportunity for inquiry by defense counsel. See Order of May 13, 1999 (App. C, *infra*, 15a) (citing *United States* v. *Clark*, 928 F.2d 733 (6th Cir. 1991). That situation is readily distinguishable from the situation in Mr. Alamo's case, where an attorney was peripherally involved in another case and where (if he had anticipated the government's elicitation of false testimony) he might have hunted in the haystack of that earlier case for documents that the government failed to disclose.

Moreover, the Sixth Circuit previously held that even assuming that the presence of an expert witness during meetings between a defendant and an IRS agent should have alerted the defendant that the expert witness might have been involved in the investigation that led to his indictment, "it still did not excuse the government's intentional misconduct of presenting [the expert] as a neutral witness." *Schledwitz* v. *United States*, 169 F.3d 1003, 1016 (6th Cir. 1999) (citation omitted). *See also United States* v. *Wilson*, 901 F.2d 378 (6th Cir. 1990) (the exculpatory evidence must not only be available to the defendant but also must lie "in a source where a reasonable defendant would have looked"). Here, there is no reason to believe that the Miller brothers' hostility to Mr. Alamo should have alerted defense counsel to the likelihood that the government would go so far as to elicit patently false testimony, nor does counsel's knowledge of that hostility "excuse the government's intentional[8/] misconduct."

[8/] Whether the government's conduct in this case was intentional, or "merely" constituted reckless disregard of the truth of facts that the prosecutor had been aware of earlier, should not be determinative. At the

Schledwitz, 169 F.3d at 1016.

Clearly, these and other precedents allow a reasonable jurist to argue in favor of granting the § 2255 petition under *Brady*, *Bagley*, and *Agurs*. In other words, petitioner has made "a threshold showing that the issues sought to be raised on appeal are at least arguably meritorious." *Smith* v. *Secretary of New Mexico Department of Corrections*, 50 F.3d 801, 820 (10th Cir. 1995). The district court's contrary conclusion can only indicate that the court confused the "debatable among reasonable jurists" standard for granting a certificate of appealability with its own judgment on the merits of the case.

In denying the certificate of appealability, the district court also failed to consider whether the fact that it had instructed the government to respond had any effect on its decision whether or not to grant the certificate. *See, e.g.*, *Dory* v. *Commissioner of Correction of State of New York*, 865 F.2d 44, 46 (2d Cir. 1989) ("if a judge requires the respondent to answer, he should normally allow the petitioner to appeal an adverse decision" by granting a certificate of probable cause).

The district court's confusion regarding the standard enunciated in *Barefoot* is also manifested in its statement that "for the same reasons the Court denies a certificate of appealability, the Court determines that any appeal in this case would not be taken in good faith. [Thus, petitioner] may not proceed on appeal *in forma pauperis*." Since the standard for *in forma pauperis* applications is absence of frivolity, the

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least, petitioner was entitled to discovery and an evidentiary hearing on the question of the prosecutor's knowledge.

court's statement appears to imply that petitioner's *Brady*, *Bagley*, and *Agurs* arguments are actually frivolous, *i.e.*, so unreasonable that "that no reasonable person [let alone counsel] could suppose [them] to have any merit." *Lee* v. *Clinton*, 209 F.3d 1025, 1026 (7th Cir. 2000). If that is indeed the implication, then the court's determination of frivolity also merely expressed the court's opinion regarding the ultimate merits of the case, because the "same reasons" developed in the court's order merely explicate the court's own, debatable reasoning with respect to those merits.

In addition to its other errors, the district court failed to reconsider its denial of a certificate of appealability when it denied petitioner's motion for reconsideration, which alternatively requested that the court grant petitioner a certificate of appealability. In denying the motion, the court tacitly modified its original conclusion regarding the previous availability to counsel of the newly discovered evidence: the court's reasoning now no longer rested on a presumption of actual "involvement" in the case that would have exposed counsel to the documents in question, but rather on the mere physical possibility of access to those documents. Yet the court did not inquire whether this modification had any consequence on its determination that petitioner could raise no issue that would be debatable among reasonable jurists. In fact, the order makes no mention whatsoever of petitioner's request for a certificate of appealability.

Given the brevity of the appellate court's order, it is impossible to ascertain whether the Sixth Circuit denied petitioner a certificate of appealability on the basis of a proper

understanding of the "debatable among reasonable jurists" standard, or whether the ruling on appeal was again based on an inappropriate determination regarding the merits. It is also impossible to ascertain whether the denial is based on a consideration of the district court's original reasoning, or on a consideration of the district court's modified explanation.

"Whether the government was required to disclose certain evidence under *Brady* is a mixed question of law and fact which [the appellate court] review[s] *de novo*." *Smith*, 50 F.3d at 827. As the matter stands, not only has petitioner received no *de novo* review, but he has received no review at all. Thus, petitioner respectfully asks the Court to instruct the court of appeals that under the *Barefoot* standard he is entitled to a certificate of appealability. Petitioner does not, however, ask the Court to examine the merits of the underlying case, as no decision on those merits has as yet been rendered by the court of appeals. *See, e.g., Hohn*, 118 S.Ct. at 1972-74 (the denial of a certificate of appealability is itself a "case" before the Court, separate from the underlying case upon which no ruling has been rendered).

II. The Use of an Inappropriately High Standard in Deciding Whether to Grant Certificates of Appealability Is Widespread, And Different Circuits Have Applied The *Barefoot* Standard in Conflicting Manners

In setting forth the "reasonable jurists" standard, the *Barefoot* opinion warned that the standard was not to be confused with a determination on the merits. *See id.*, 463 U.S. at 893 n.4. The Court also explained that "probable cause requires *something more* than the absence of frivolity, and that

the standard is a higher one than the 'good faith' requirement of [28 U.S.C.] Sec. 1915 [applications for *in forma pauperis* status]." *Id.* at 893 (quoting Blackmun, *Allowance of In Forma Pauperis Appeals in Sec. 2255 and Habeas Corpus Cases*, 43 F.R.D. 343, 352 (CA8 1967)) (emphasis added). As discussed, *infra*, several pre-*Barefoot* lower court opinions, cited with approval in *Barefoot*, explicated the distinction between a determination on the merits and a determination of "debatability among reasonable jurists" in considerable detail, and gave useful instructions on how *much* more than the absence of frivolity is required before a certificate must be granted. Many courts, however, have failed to distinguish the separate inquiries. Instead, these courts (perhaps due to an unconscious movement of thought, whereby the judge who asks himself whether the issues on appeal would present "something more than frivolity" slides into a restatement of his own merits determination) have repeated the *Barefoot* formula in an increasingly wooden fashion and have rendered decisions that are in fact incompatible with *Barefoot*.

In 1993, Judge Ripple of the United States Court of Appeals for the Seventh Circuit commented on this increasing tendency to deny applications for certificates of probable cause based on an erroneous interpretation of *Barefoot*. Judge Ripple described the courts' denials as "symptomatic of the growing tendency . . . to measure such applications, either explicitly or implicitly, by an *inappropriately high standard*." *Cuppert* v. *Duckworth*, 8 F.3d 1132, 1149 (7th Cir. 1993) (Ripple, C.J., concurring) (emphasis added).

Hundreds of certificates of appealability are denied

annually; many denials take the form of unpublished summary orders which often, as here, are not even available on Westlaw or Lexis. A review of certificate decisions from numerous circuits points to the existence of persistent conflicts, both in theory and practice, among the circuits regarding the proper application of the standard enunciated in *Barefoot*. The Second Circuit, for example, has specifically emphasized that "if a judge requires the respondent to answer, he should normally allow the petitioner to appeal an adverse decision" by granting a certificate. *Dory*, 865 F.2d at 46. This guideline makes good sense in light of the certificate requirement's purpose of eliminating frivolous appeals. No such guideline, however, exists in the Sixth Circuit, and in this case the certificate was denied despite the fact that the district court directed the government to answer, and without any discussion of whether that action of the district court had any pertinence to the decision whether or not to grant the certificate. Denial of a certificate in such a context is inappropriate, particularly where, as here, the government's response contains an implicit admission of prosecutorial negligence. In such circumstances, when a petitioner has raised questions substantial enough to require a response, a strong presumption ought to exist that those issues reach the minimum threshold of appealability if the district court rules against the petitioner on the merits. At the very least, if the court decides that, regardless of their substantiality, those issues are not appealable, then it ought to explain, in terms which do not simply refer to the court's determination of the merits, how the government's response demonstrates the absence of any appealable issue. Otherwise, the denial of the certificate will necessarily create the

appearance, if not the reality, of a merging of threshold and merits analyses and, accordingly, of unfairness.

While some circuit court decisions make a proper distinction between the questions of appealability, and the merits,[9/] others appear to confuse the proper standard with a determination of the ultimate merits of the case. Typically, in these decisions, the court will engage in a lengthy discussion of the merits of

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[9/] Decisions that would seem to apply the proper standard under *Barefoot* include *Proudfoot* v. *Vaughn* (1998 WL 13313, *3 (E.D. Pa 1998) (granting certificate because it was unsettled whether failure to demonstrate actual prejudice barred the due process claim raised by the petitioner when other factors weighed in favor of the claim); *United States* v. *Marshall*, 1998 WL 295590, *3 (D. Kan 1998) (granting certificate despite court's "strong belie[f]" that the petitioner did not receive ineffective assistance of counsel, because "the court [also] believes there is sufficient room for debate among jurists" regarding that issue); *Smith* v. *United States*, 989 F.Supp. 371, 374 (D. Mass. 1997) (denying certificate because court did not credit petitioner's factual assertion that he lied under duress when responding to court's questions during "thorough plea colloquy"); *Flieger* v. *Delo*, 16 F.3d 878, 882 (8th Cir. 1994) (stating that district court's issuance of certificate was proper under the debatable-among-reasonable-jurists standard, but deciding *merits* of habeas appeal against petitioner); *Daugherty* v. *Dugger*, 831 F.2d 231 (11th Cir. 1987) (granting certificate because petitioner raised "constitutional issues which are debatable among reasonable jurists," over dissent of one circuit judge who believed petitioner failed to "make a substantial showing of the denial of a federal right"); *Garris* v. *Lindsay*, 794 F.2d 722, 727 (D.C. 1986) (denying certificate because petitioner's claims were procedurally barred); *Gaddy* v. *Linahan*, 570 F. Supp. 36 (N.D. Georgia 1983) (denying certificate because a "comprehensive factual hearing" had been held before the state habeas court and the disputed findings were "essentially factual").

the case, and then summarily deny the certificate. *See, e.g.*, *Battle* v. *Armstrong*, 814 F. Supp. 1412 (E.D. Missouri 1993) (analyzing merits of issues and denying certificate of probable cause for each issue seriatim); *Black* v. *Collins*, 962 F.2d 394, 404 (5th Cir. 1992) (concluding, after lengthy and complex analysis of legal issues, that capital defendant did not "establish" his case of ineffective assistance of counsel, and then denying certificate of probable cause on account of court's "disagree[ment]" with defendant's argument that he had raised issues that are debatable among jurists of reason); *Jacobs* v. *Scott*, 31 F. 3d 1319 (5th Cir. 1994) (similar lengthy analysis of involved legal issues followed by denial of certificate); *Sawyers* v. *Collins*, 986 F.2d 1493 (5th Cir. 1993) (same type of lengthy legal analysis followed by denial of certificate).[10/]

[10/] Disturbingly, many of the Fifth Circuit certificate denials arise as the final judicial statements in death penalty cases. A troubling example of such a denial is *Riles* v. *McCotter*, 799 F.2d 947, 954-55 (5th Cir. 1986), in which a concurring opinion, authored by one of the three judges and joined by another, noted that "if [he] were free to do so, [the concurring judge] would order an evidentiary hearing on the effectiveness of counsel," because "a sufficient showing has been made that trial counsel did not provide this accused with the quality of defense essential to adequate representation in any felony case, and particularly in a capital case." *Id.* at 955 (emphasis added). Assuming, on the merits, that all three judges properly concluded that the capital petitioner failed to demonstrate he had been prejudiced by the alleged ineffectiveness of counsel, *see Strickland* v. *Washington*, 466 U.S. 668 (1984), it is still difficult, given the opinion of two judges regarding the degree of inadequacy of petitioner's trial counsel, to agree with their conclusion that no reasonable jurist could have *debated* the matter. It is important, of course, to distinguish between cases where a controlling decision of the Court on the specific issue at stake eliminates all

Given that the vast majority of certificate denials take the form of summary orders, it is impossible to ascertain the grounds on which most courts base their denial decisions. Thus, the exact extent to which a confusion between the merits determination and the "debatable among reasonable jurists" standard exists is unverifiable. Nonetheless, to the extent such a confusion does exist, it creates a systemic difficulty within the federal criminal justice system, defeating the purpose underlying the certificate of appealability requirement. The certificate requirement "furthers the salutary purpose of weeding out frivolous appeals." *Smith*, 50 F.3d at 820 (citing *Barefoot*, 463 U.S. at 892-93). But where courts measure applications by an inappropriately high standard, appellate lawyers will necessarily come to understand that they must in fact attempt to argue the merits of a case at length in the prisoner's application for a certificate of appealability. Indeed, petitioners will stand in a quandary: either they decide to limit themselves to arguing under the proper standard, and run the risk of being defeated by a merits analysis without having had the opportunity to submit appellate arguments, or else they decide to submit the equivalent of an appellate brief in lieu of a certificate application – thereby, in the case of frivolous appeals, imposing the same burden of review on the appellate

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room for debate in the court of appeals, and others where the lack of such a controlling decision may render an issue debatable. Assuming that the *Riles* court was obliged to decide as it did under *Strickland*, the lack of any comparable controlling Court decision (and, indeed, of any controlling decision whatsoever) on the *Brady* issue raised by Mr. Alamo renders the debatable nature of that issue all the more apparent.

courts that the certificate requirement was intended to reduce in the first place.

III. The Tendency to Apply an Inappropriately High Standard Results From a Lack of Clarity Concerning The Proper Standard

An important source for the tendency to apply an inappropriately high standard to certificate applications would appear to lie in the fact that neither *Barefoot* nor *Slack* provide specific guidance on how to determine whether an issue is "debatable among reasonable jurists," and thus "substantial" enough to qualify for review. Earlier discussions of the standard – including discussions in some of the lower court decisions cited with approval in *Barefoot* – do provide such guidance, and the Court should provide similar guidance now.

For example, *Barefoot* quoted with approval *Gordon* v. *Willis*, 516 F. Supp. 911, 913 (N.D. Ga. 1980), where the standard is explicated at length as follows:

> Even a weak argument[,] one which may be well beyond the law's existing frontier but well within the frontier of rationality[,] is properly certified under § 2253, whereas a frivolous argument[,] one for which no rational argument can be made[,] is not subject to § 2253 certification. Although . . . an argument may be so weak as to become frivolous, th[is] standard . . . is valid. In essence, this Court must reflect on the decision-making process which preceded the initial order. If there was considerable law supporting petitioner's argument, but stronger authority for the position of the respondent, then the certificate should be granted. On the other hand, if

> the precise issues have been litigated previously in the court, or were disposed of simply (as where the petitioner has not exhausted state remedies), the certificate properly is denied . . . [T]he Court . . . must decide whether an attorney, whose craft it is to mold the facts and law into a rational thesis, could succeed in making an argument which is neither frivolous, nor so weak as to border on mere palaver . . . [O]bviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason . . . .

516 F. Supp. at 913 (citations and quotations omitted). *Barefoot* quoted only the last three sentences of this formulation, stating that the "quotation cogently sums up th[e] standard." *Id.*, 463 U.S. at 893 n.4. But *Barefoot* did not assert – or otherwise provide any reason to believe – that *Gordon*'s explanatory analysis was wrong; indeed, by quoting that particular case with approval and without qualification, the Court implied that jurists might look to it for an authoritative discussion of the topic.

As stated, *supra*, the *Barefoot* opinion explicitly indicated that "Congress established the requirement that a prisoner obtain a certificate of probable cause *in order to prevent frivolous appeals* . . . ." *Id.* at 892 (emphasis added). The Court, however, also quoted Justice Blackmun's statement that "probable cause requires something more than the absence of frivolity, and that the standard is a higher one than the 'good faith' requirement of [applications for *in forma pauperis*

status]." *Id.* at 893. At first blush, the juxtaposition of the statement regarding prevention of frivolous appeals, with the words "something more than the absence of frivolity" seems to indicate that *Barefoot* contains a patent ambiguity. It might also appear that Justice Blackmun's formulation conflicts with the explanation provided in *Gordon*, for *Gordon* states that "a frivolous argument . . . is not subject to § 2253 certification," a statement that might seem to imply that, under *Gordon*, the mere absence of frivolity suffices to meet the standard.

There is in fact, however, no reason to believe that the various statements regarding frivolity and "something more" than frivolity conflict. Justice Blackmun's discussion is cited with approval in *Gordon*, immediately after the above-quoted passage. As one commentator has noted, "[t]here is a vast difference between a weak case, even a very weak case, and a frivolous one . . . It may well be that there are arguments that can be made on behalf of the petitioner that are well beyond the law's existing frontier but well within the frontier of rationality." Ronald P. Sokol, *Federal Habeas Corpus*, 2d ed., sec. 26, p. 196 (1969).[11/] The rule that can be distilled from

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[11/] This statement is quoted with approval in *Dillingham* v. *Wainwright*, 422 F. Supp. 259, 261 (S.D. Fla. 1976), *aff'd*, 555 F.2d 1389 (5th Cir. 1977) (a case in turn quoted with approval in *Gordon*, 516 F.Supp. at 912). *See also McCoy* v. *Wainwright*, 630 F.Supp. 122, 124 (S.D. Fla. 1986) (quoting Sokol and emphasizing that "[c]ourts . . . must be heedful of that delicate distinction between the 'weak' argument and one that is purely 'frivolous'"). *Cf. Lee* v. *Clinton*, 209 F.3d 1025, 1026 (7th Cir. 2000) (a claim is frivolous if it is a claim "that no reasonable *person* could suppose to have any merit") (emphasis added).

both the *Gordon* opinion and Justice Blackmun's statement is that if an attorney would be unable to "mold the facts and law into a rational [legal] thesis," then the mere fact that one might be able to form a rational argument from a non-legal perspective will not suffice to meet the "debatable among reasonable jurists" standard. Ultimately, however, if the facts and the law are such as to allow the petitioner to come forward with a legally cognizable argument – even one that appears to be weak – on appeal, the certificate of appealability must be granted.

This Court should also note that long before *Barefoot*, at least two Justices provided extremely useful explanations of the "substantial question" standard, in the context of decisions on whether to grant bail to an imprisoned defendant waiting for his case to be heard on direct appeal. Prior to 1956, and again since the enactment of the Bail Reform Act in 1984, 18 U.S.C. § 3143, a defendant, to obtain bail, needed to demonstrate that the questions he intended to raise on appeal were "substantial." Justice Douglas explained:

> The question may be "substantial" even though the judge or justice hearing the application for bail would affirm on the merits of the appeal. The question . . . may present unique facts not plainly covered by the controlling precedents. It may involve important questions concerning the scope and meaning of decisions of the Supreme Court. *The application of well-settled principles to the facts of the instant case may raise issues that are fairly debatable.* An appellant, though guilty beyond question, may have been denied the kind of a

> trial that [he was] entitled to under the Constitution and our laws . . . Responsible and conscientious counsel [may] pose some problems that on th[e] record are not free of doubt.

D'Aquino v. *United States*, 180 F.2d 271, 272 (11th Cir. 1950) (Douglas, Circuit Justice) (emphasis added). Five years later, Justice Douglas expanded upon his explanation:

> Further study of a problem often changes a vote. Further study may do more; it may indeed change the views of the majority of a court . . . It is not enough that I am unimpressed. I must decide whether there is a school of thought, a philosophical view, a technical argument, an analogy, an appeal to precedent or to reason commanding respect that might possibly prevail . . . There is room for argument on many rules of law and on most of their applications. The shadow of a doubt across one's own conclusions is itself sufficient . . . . I do not believe, however, that there is necessarily an end to the problem . . . even though I reach the conclusion that on the merits there is no appellate judge who would likely reverse the judgment of conviction. That does not mean that there is no substantial issue which "should be determined by the appellate court." A question may nevertheless be "substantial" . . . if it is novel, or if there is a contrariety of views concerning it in the several circuits, or if the appellate court should give directions to its district judges on the question, or if in the interests of the administration of justice some clarification of an existing rule should be made.

Herzog v. *United States*, 75 S.Ct. 349, 350-51 (1955) (Douglas, Circuit Justice). *See also Williamson* v. *United States*, 184 F.2d 280, 282 (2d Cir. 1950) (Jackson, Circuit Justice) (explaining that courts might announce *correct* rulings that nonetheless merit *review*); *United States* v. *Handy*, 761 F.2d 1279, 1281-82 (9th Cir. 1985) (quoting with approval Justices Douglas and Jackson, and stating that the standard as explained by them is the same as the *Barefoot* standard); *United States* v. *Smith*, 793 F.2d 85, 90 (3rd Cir. 1986) (drawing the same link between the bail standard and *Barefoot*); *but cf. United States* v. *Giancola*, 754 F.2d 898, 900 (11th Cir. 1985) (stating that, in the bail context, a "substantial question" is a "'close' question or one that very well could be decided the other way").[12/]

Under *any* of the formulations discussed *supra*, the district

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[12/] The dissenting opinion in *Handy* argues, following *Giancola*, that a "substantial" question should be a "close" one. The dissent distinguishes Justice Douglas's view on the ground that it was based on the premise that "[d]oubts whether [bail pending appeal] should be granted or denied should always be resolved in favor of the defendant," a presumption that, in the dissent's view, was overturned by the 1984 Bail Reform Act. Therefore, the *Handy* dissent takes issue with the majority's analogy between the "historical" bail standard (i.e., the standard as explained by Justice Douglas) and *Barefoot*, because *Barefoot* "and the authority it in turn relied on were decided in the context of a habeas proceeding, where 'doubts should be resolved in favor of the petitioner.'" *Id.*, 761 F.2d at 1285 (quoting *Gordon* and *Barefoot*). Thus, even the *Handy* dissent implicitly concedes that, under this view, the *Barefoot* standard requires that doubts be resolved in favor of the petitioner, and does *not* require that the petitioner present a "close" question for review.

court applied an inappropriately high standard in determining whether Mr. Alamo raised an issue debatable among reasonable jurists. If, on the other hand, the standard applied by the district court were in fact acceptable under one or another of the cited formulations, then one would be confronted with conflicting formulations. In either case, an explicit clarification of the law by the Court would be in the best interests of justice.

IV. The Court Should Provide Supervisory, Non-plenary Review of Denials of Certificates of Appealability, Because the Failure to Apply the Proper Standard Impinges upon a Substantive Right, Results in a Confusion Between Two Kinds of Legal Inquiries, and Now Affects Federal as Well as State Prisoners

In arguing that the Court should respond to an erosion of the "debatable among reasonable jurists" standard, petitioner is not suggesting that the Court should assume the burden of granting plenary review whenever it is confronted with the question whether a court of appeals properly exercised its authority by refusing to grant a certificate of appealability. Nonetheless, a case should not have to have earth-shattering significance for this Court to ensure that it be accorded plenary review by the *court of appeals* when it reaches the threshold of reasonability. An appropriate solution would be for the Court to develop some type of supervisory mechanism or procedure by which, either by exercising the certiorari power without granting plenary review (*i.e.*, without full briefing or oral argument), or by referral of petitions to individual circuit justices,[13/] it might

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[13/] The statute itself authorizes circuit justices to issue certificates of appealability. *See* 28 U.S.C. § 2253 (App. E, *infra*, 36a) (no appeal to court

limit itself to applying the "debatable among reasonable jurists" standard to determine whether certain cases merit plenary review by the courts of appeals.

Not only would such a procedure preserve the Court's capacity to correct misapplications of the law, *see Hohn* v. *United States*, 118 S.Ct. 1969, 1977 (1998), but it would also enable the Court to protect fundamental values that lie at the core of our criminal justice system:

First, a defendant has a *substantive right* to a certificate where he meets the proper threshold standard; it is for this reason that a court of appeals may not quash a certificate once it is issued by a district court. *See, e.g., Nowakowski* v. *Maroney*, 386 U.S. 542 (1967); *Stewart* v. *Beto*, 454 F.2d 268, 269 (5th Cir. 1971) (cited with approval in *Barefoot*, 463 U.S. at 894.

Second, as one member of the Court observed nearly forty years ago, the confusion between an ultimate merits standard and a preliminary threshold standard "would raise serious questions of due process." *Coppedge* v. *United States*, 369 U.S. 438, 457 (1962) (Stewart, J., concurring). This is so, because:

[t]he filing of memoranda in support of an application

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of appeals "unless a circuit justice or judge issues a certificate of appealability"). *See also Davis* v. *Jacobs*, 454 U.S. 911, 913, 918 (1981) (indicating that "a Circuit Justice, or this Court itself, may issue a certificate of probable cause"); *Rosoto* v. *Warden*, 83 S.Ct. 1788 (1963) (Harlan, J., in chambers) (denying certificate of probable cause because of lack of substantial question).

> for leave to appeal is not an appeal. The merits of the ultimate issues are not logically involved at this point, but only the weight of those issues. Appellate briefs are not written or submitted. There is no oral argument. The court's mode of considering such memoranda, as a matter of internal machinery, may markedly differ from the process employed in the decision of cases actually on appeal.

Id. Thus, while it may be understandable that courts of appeals come to think of preliminary threshold proceedings as "tantamount to appeals on the merits," *id.*, the result, in such a case, is abhorrent to justice. Indeed, in discussing the tendency of certain courts to apply an inappropriately high standard when determining whether to grant certificates, Judge Ripple of the Seventh Circuit observed that if those courts continued to fail to "adhere to a principled application of existing standards of law," they would become "case-processing," rather than "case-deciding" institutions." *Cuppert*, 8 F.3d at 1149. The implication, of course, is that many defendants are wrongly being denied their right to have their cases evaluated in the full light of judicial reasoning.

Finally, these problems are exacerbated by the enactment of the AEDPA, which created an entire new class of individuals subject to the certificate requirement. Before 1996, federal prisoners benefitted from the right to appeal district court denials of their § 2255 petitions directly without applying for a certificate of probable cause. To a large degree, this traditional right of appeal compensated for the fact that federal prisoners have only one opportunity for post-direct-appeal

relief under § 2255 – unlike state prisoners, who can (and indeed, must) have their cases re-examined through state court collateral review before petitioning for relief under § 2254. Now, however, since post-AEDPA federal defendants as well as state defendants are obliged to obtain a certificate of appealability before having their cases reviewed by the courts of appeals under § 2255, not only will the rate of erroneous denials of certificates predictably increase (for the pool of certificate applicants has increased), but federal prisoners find themselves at a higher risk of failing to have their post-direct-appeal petitions heard by any appellate judge whatsoever. Therefore, the Court should continue to fulfill its "normal function," *Hohn*, 118 S.Ct. at 1978, of correcting misapplications of the law when courts erroneously fail to grant certificates of appealability by confusing the *Barefoot* standard with determinations on the merits.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the United States Court of Appeals for the Sixth Circuit's denial of a certificate of appealability.

Respectfully submitted

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-6420

BERNIE LAZAR HOFFMAN, aka Tony Alamo,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Before:

Martin, *Chief Judge*

ORDER

Bernie Lazar Hoffman aka Tony Alamo, appeals a district court judgment denying his motion to vacate sentence filed pursuant to 28 U.S.C. § 2255. Hoffman applies for a certificate of appealability. *See* Fed. R. App. P 22(b).

Upon review, the court hereby denies the application because Hoffman failed to make a substantial showing of the

denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2); *cf. Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

Filed: April 28, 2000
Leonard Green, Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Cv. No. 98-2323-M1/A
Cr. No. 93-20103-M1

UNITED STATES OF AMERICA,
Plaintiff,

v.

BERNIE LAZAR HOFFMAN, a/k/a/ TONY ALAMO,
Defendant.

Order Directing United States to Respond
Order Denying Motion to Compel Discovery

The defendant has filed a motion under 28 U.S.C. § 2255 attacking his convictions for violating 26 U.S.C. §§ 7203 and 7206. Defendant raises the following issues:

1. The prosecutor failed to turn over evidence favorable to the defendant; and
2. The prosecutor knowingly elicited perjurious and

materially misleading testimony from government witnesses.

In this case, the United States' interest in protecting its judgment from further collateral attack warrants requiring a response to let it clarify the record. It is ORDERED that the United States file a response to the motion within twenty-three days from the date of this order.

The defendant has also filed a motion to compel discovery. At this time, the Court DENIES that motion without prejudice. Defendant may renew the motion after the response of the United States has been filed and the Court has had adequate time to review that response.

The Clerk shall provide a copy of the motion in this cause and this order to the United States Attorney for the Western District of Tennessee.

IT IS SO ORDERED this 30th day of September, 1998.

/s/ Jon Phipps McCalla
JON PHIPPS McCALLA
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Cv. No. 98-2323-M1/A
Cr. No. 93-20103-M1

UNITED STATES OF AMERICA,
Plaintiff,

v.

BERNIE LAZAR HOFFMAN, a/k/a/ TONY ALAMO,
Defendant.

Order Denying Motion Under 28 U.S.C. § 2255
Order Denying Certificate of Appealability and
Order Certifying Appeal Not Taken in Good Faith

On April 8, 1998, Defendant, Bernie Lazar Hoffman, a/k/a/ Tony Alamo, through counsel, filed a motion under 28 U.S.C. § 2255 seeking to set aside his convictions for violating 26 U.S.C. § 7206 and 26 U.S.C. § 7203. The Court directed the United States to respond to the motion. The United States'

response was filed on November 25, 1998. On December 23, 1998, Defendant filed a reply to the United States' response. For the reasons stated below, the Court DENIES Defendants' motion under § 2255, DENIES him a certificate of appealability, and CERTIFIES that any appeal is not taken in good faith.

I. PROCEDURAL HISTORY

On April 19, 1993, Defendant was indicted for one count of filing a false income tax return for the year 1985 (count one), in violation of 26 U.S.C. § 7206(1), and three counts of failing to file an income tax return for the years 1986 (count two), 1987 (count three), and 1988 (count four), in violation of 26 U.S.C. § 7203. These charges arose from Defendants' operation of various businesses placed in the name of Music Square Church (MSC), a tax-exempt entity. Between May 16, 1994 and June 6, 1994, the Court presided at a jury trial.

At trial, the government contended that Defendant was the owner in fact of the various businesses and that the income from those businesses should have been reported on his personal tax returns. In the alternative, the government contended that if MSC was the true owner of the businesses, Defendant diverted funds from MSC and businesses to his own personal use and benefit. For count one, the government was required to prove that Defendant made and signed a materially false return and that he knew the return substantially understated his gross income. That Defendant signed the 1985 return under the penalty of perjury was not disputed. For the

remaining counts, the government was required to prove that Defendant received gross income greater than the filing requirement for each year, that he did not file a return, and that the failure to file was willful.

Defendant contended that he was operating a tax exempt organization for the purposes of his ministry, did not know his 1985 return was materially false, and had no gross income over the filing requirement for the years 1986-88.

The government presented evidence and the testimony of twenty-eight witnesses during its case in chief on the issues of Defendant's ownership and control of the businesses and his income. Two of those witnesses were hostile witnesses. The government also presented the testimony of three rebuttal witnesses. Defendant testified in his own defense and presented evidence and the testimony of fourteen additional witnesses. Both sides presented the expert testimony of certified public accountants on the issue of income.

The trial concluded with the jury finding Defendant guilty on all four counts. Between September 9, 1994 and September 16, 1994, the Court conducted the sentencing hearing, and on September 30, 1994, entered a total sentence of seventy-two months.[14/]

[14/] The Court imposed a sentence of thirty-six months on court one, and a sentence of twelve months on court two, to be served consecutively to count one. The Court imposed consecutive twelve month sentences on counts three and four, to be served consecutively to the sentences imposed for counts one and two.

Defendant retained new counsel and filed a motion for new trial and/or judgment of acquittal on the basis of ineffective assistance of counsel and the operation of the statute of limitations as to count one. After an evidentiary hearing on July 14, 1995, and the submission of post-hearing briefs, the Court entered an order denying the motion on February 1, 1996. *See United States* v. *Hoffman*, 926 F. Supp. 659 (W.D. Tenn. 1996). Defendant appealed his conviction and the denial of his motion for a new trial. The Sixth Circuit Court of Appeals affirmed Defendant's conviction and the Court's order denying Defendant's motion for a new trial. *See United States* v. *Hoffman* 124 F.3d 200, 1997 WL 476513 (6th Cir. Aug. 19, 1997), *cert. denied*, 118 S.Ct. 725 (1998).

Although Defendant is at the time of this Order under supervised release, that fact does not moot his § 2255 motion. *See United States* v. *Zack*, No. 98-1526, 1999 WL 96996, at *1 (6th Cir. Feb. 1, 1999).

II. DISCUSSION

Defendant claims that his convictions should be set aside. Defendant contends his right to due process was violated when the prosecution:

1) failed to disclose:
   (a) Internal Revenue Service (IRS) memoranda from previously discontinued investigations of Defendant and MSC;
   (b) the existence of two IRS Forms 211 applications

for reward submitted by government witnesses Robert and Carey Miller;[15]

2) elicited materially misleading testimony from:
   (a) Agent Larry Howlett, Agent Charles Beauregard and Robert Miller concerning the Millers' Forms 211 and
   (b) Agent Howlett concerning the receipt by the government of ledgers relating to Defendant's finances.

The Court addresses each of Defendant's claims in turn.

A. Government's Failure to Disclose Exculpatory Evidence

Under *Brady* v. *Maryland*, 373 U.S. 83 (1968), the government must disclose to a criminal defendant evidence that is both favorable to him and material to guilt or punishment. *See Brady* v. *Maryland*, 373 U.S. 83 (1963). Failure to disclose such evidence merits the granting of a new trial or a hearing on motion for a new trial.

To make a claim of a *Brady* violation, a defendant must show the discovery after trial of information both favorable to him and material to guilt or punishment which had been known to the prosecution but which was unknown to the defense. *See United States* v. *Agurs*, 427 U.S. 97, 103 (1976). Defendant

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[15] A Form 211 application for reward money is contingent on the Government convicting the defendant and recovering back taxes, fines, and penalties.

bears the burden of demonstrating all of these elements.

The government's disclosure obligation includes evidence that could be used to impeach the credibility of a witness. *See United States* v. *Bagley*, 473 U.S. 667, 676 (1985); *Shledwitz* v. *United States*, ___ F.3d ___, 1999 WL 104467, at *7 (6th Cir. Mar. 3, 1999); *United States* v. *Mullins*, 22 F.3d 1365, 1372 (6th Cir. 1994). A *Brady* violation may occur even if the exculpatory evidence was not requested by the defense or was requested only generally. *See Kyles* v. *Whitley*, 514 U.S. 419, 433 (1995); *see also United States* v. *Frost*, 125 F.3d 346, 382 (6th Cir. 1997).

Information is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. Four aspects of materiality under *Bagley* are particularly emphasized. *See Kyles*, 514 U.S. at 434. First, "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* Second, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Id.* at 434-35. Third, "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review." *Id.* at

435. Fourth, the materiality of suppressed evidence must be considered "collectively, not item by item." *Id.* at 436. Likewise, "the omission must be evaluated in the context of the entire record." *Agurs* 427 U.S. at 112.

Defendant first contends that the Government failed to disclose recently discovered documents from prior IRS investigations of Alamo which did not result in formal criminal charges or civil liability. Defendant references IRS agents' notes of two 1981 phone interviews with Defendant's accountant, Arthur Applemen, which allegedly suggest that the accountant knew of no wrongdoing on the part of Defendant.[16/]

The content of the IRS notes is hearsay that would not have been admissible through cross-examination of witnesses. Defendant claims that possession of the IRS notes would have led to further discoverable information or improved cross-examination tactics. However, the U.S. Court of Appeals for the Sixth Circuit has held that information relevant neither to guilt nor to credibility "but which might be of use to the defendant in acquiring exculpatory or impeachment evidence

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[16/] Defendant argues that such evidence would have allowed the defense to explore the reasons why no formal charges were brought in the previous investigations and to support Defendant's claims of harassment. At trial, the Court ruled that issues arising from previous investigations were not germane to this criminal prosecution and that the motive of the government in this case was not an issue, although Defendant would be allowed to use the proof of the discontinued investigations to establish his good faith belief of no wrongdoing in the manner in which the businesses were operated. (Tr. at 28-31.) Accordingly, these arguments are without merit.

that the defendant had thought was unavailable" need not be disclosed. *Mullins*, 22 F.3d at 1372. Moreover, the mere possibility that the IRS notes might have helped the defense does not establish materiality. *See Agurs*, 427 U.S. at 109-110; *see also United States* v. *Phillip*, 948 F.2d 241, 250 (6th Cir. 1991) (holding that information withheld by the prosecution is not material under *Brady* unless it consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes). Defendant's speculation as the evidence's potential usefulness is not sufficient to sustain Defendant's burden of showing materiality.

For these reasons, the Court finds no *Brady* violation for any alleged failure to disclose the notes from two IRS interviews with Defendant's accountant.

Second, Defendant contends that evidence relating to the submission of Forms 211 by the Millers in the initial stages of the Government's investigation of Alamo and MSC was not disclosed to Defendant and was only recently discovered during the course of discovery in the *Music Square Church* v. *United States* case, which is before the United States Court of Federal Claims.

Defendant elicited testimony from Agent Howlett that the Millers submitted Forms 211 in conjunction with a March, 1990 meeting regarding provision of information by the Millers in the IRS investigations. Defendant supplements his claim that the Millers submitted Forms 211 with 1991 affidavits of Carey Miller and Peter Georgiades, the Millers' attorney, and

Georgiades' petition for attorneys' fees; these documents were filed in an unrelated lawsuit in 1991. *See Tony and Susan Alamo Found., Inc.* v. *United States*, No. 3:90-0901, 1992 WL 235873 (M.D. Tenn. July 13, 1992).[17]

Defendant points to two aspects of Carey Miller's testimony that he argues were not corroborated by other

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[17] Carey Miller's May 20, 1991 affidavit stated:

> Mr. Beauregard, Mr. Howlett and Mr. Daniel Brauwieler [sic], an attorney for IRS from Dallas, Texas, met with me and my attorney, Peter Georgiades, in Mr. Georgiades' hotel room in Fort Smith, Arkansas. After filling out forms (IRS Form 211's) to apply for a reward for information leading to conviction of Mr. Alamo, and with our permission, Mr. Georgiades gave these IRS agents information about how Mr. Alamo operated, the names and locations of potential witnesses, and other information.

C. Miller Aff. at 5. The affidavit further states that the affiant was subsequently visited by Mr. Brauweiler and another IRS attorney in August, 1990, at which time the affiant asked Brauweiler whether the IRS had processed his Form 211. "Mr. Brauwieler [sic], however, would only refer me to Mr. Howlett and Mr. Beauregard to the answers to my questions." C. Miller Aff. at 6.

In a May 29, 1991 affidavit, Georgiades stated: "After the hearing on March 6-7, 1990, Mr. Howlett, Mr. Beauregard and Mr. Brauweiler all came to my hotel room, at which time we gave Mr. Beauregard an executed IRS Form 211 'Application for Reward for Original Information.'" Georgiades Aff. at 4.

The government supplied the Court with affidavits from Beauregard, Brauweiler, and Georgiades stating that they did not recall Forms 211 being completed by the Miller brothers. These affidavits were sworn to in October or November, 1998.

witnesses: that Defendant ordered church members to alter records of the corporation and create false corporate resolutions, and that the reason for Defendant's transferring ownership of the church's property from the Tony and Susan Alamo Foundation to its successor, Music Square Church, was to avoid IRS seizure of the property. Defendant's contention is that evidence of the completion and filing of Forms 211 by the Miller brothers constituted material impeachment evidence which was required to have been disclosed to the defense prior to trial.

While there is no evidence that the IRS has on file any Forms 211 completed by the Miller brothers or evidence that the Miller brothers ever received any reward money, evidence that the Miller brothers believed that they had completed and submitted Forms 211 could tend to show bias.[18/]

The prosecutor in Defendant's criminal case, John Belcher, supplied an affidavit stating that he had no information at the time of trial that the Miller brothers had submitted Forms 211. However, a prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." *Kyles*, 514 U.S. at 437. Therefore, for

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[18/] It is less than clear at this stage that the possible completion of the Forms 211 by the Miller brothers in 1991 would have been impeaching by 1994. The 1991 affidavits do not reflect the changing positions of the Millers who, by the time this case was tried in 1994, were in direct competition with the IRS for Alamo's assets and were attempting to collect a judgment against Alamo for over one million dollars. Carey Miller was cross examined on this issue. (Tr. at 2860.)

purposes of this Order, the Court charges Belcher with constructive knowledge of the Miller brothers' completion of the Forms 211 at the time of the trial, since those working on his behalf had such knowledge at the time.

Even assuming that Plaintiff could demonstrate the materiality of the non-disclosed evidence, which issue the Court expressly does not resolve, an independent ground for finding that the withholding of the evidence was not a violation of *Brady* is that Defendant has not offered proof that the defense did not know of the evidence at the time of trial. The affidavit of Jeffrey Dickstein, Defendant's counsel at trial, does not state that he did not know of Forms 211 possibly completed by the Millers.

In fact, that evidence was available to Defendant from another source. *See United States* v. *Clark*, 928 F.2d 733, 738 (6th Cir. 1991). A review of the docket sheet for *Tony and Susan Alamo Foundation* reveals that the Foundation was represented from the initial stages of the litigation by attorney Neal Pendergraft, who provided files during the initial stages of Defendant's criminal prosecution. The court records also reflect that Tony Alamo individually intervened in that action on October 25, 1991. Alamo's counsel was Dickstein. Although the affidavits of Carey Miller and Peter Georgiades were filed on May 21, 1991, the issue of Georgiades' attorneys' fees was litigated long after the intervention of Alamo and the affidavits were in the court record. That matter was concluded well before the criminal trial here occurred. The evidence with

regard to the Forms 211 which Defendant claims is newly discovered was part of the public record in a civil case in which Defendant and his counsel were involved prior to the criminal prosecution underlying this case.

Even if the prosecution knew of exculpatory evidence and intentionally withheld it, there is no *Brady* violation if the defense knew of the evidence at the time of the trial. The Supreme Court expressly rejected incorporating the good or bad faith of the prosecution as part of the relevant test for the withholding of exculpatory evidence. *See Brady*, 373 U.S. at 87. Therefore, the Court finds that Defendant has failed to show a *Brady* violation because he has not shown that evidence of the potential completion of the Forms 211 by the Miller brothers was unknown to the defense at the time of trial.

B. Elicitation of False Testimony

Defendant alleges that the Government knowingly elicited perjured testimony on the issues of whether deals were made with witnesses and whether certain ledgers had been turned over to the Government. This type of *Brady* violation also involves the discovery after trial of information which had been known to the prosecution but unknown to the defense. *See Agurs*, 427 U.S. at 103; *see also United States* v. *Pierce*, 62 F.3d 818, 825 (6th Cir. 1995) ("Evidence is not newly discovered when it is necessarily known by the Defendant at the time of trial.").

"To prevail on a claim that the government presented

perjured testimony, [the movant] must show '(1) that the statements were actually false; (2) the statements made were material; and (3) [the] prosecution knew they were false." *Pierce*, 62 F.3d at 834 (quoting *United States* v. *Farley*, 2 F.3d 645, 655 (6th Cir. 1993)). Such evidence is material "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Agurs*, 427 U.S. at 103; *United States* v. *O'Dell*, 805 F.2d 637, 641 (6th Cir. 1986). If these criteria are met, a conviction must be set aside. *See O'Dell*, 805 F.2d at 641.

The Court first addresses Defendant's allegation that the prosecutor knowingly elicited misleading testimony from Beauregard, Howlett, and Robert Miller with regard to any deals made with witnesses. Defendant's accusation in this regard again turns on the evidence that Forms 211 were completed by the Miller brothers.

Even assuming the falsity and materiality of the statements, Defendant has not demonstrated that the prosecutor, Belcher, knew at the time of trial that any of the statements were false. At best, Defendant has demonstrated that at some point in the prolonged investigation leading up to trial, one of the IRS agents told Belcher of the completion of Forms 211 by the Miller brothers.[19/] However, Belcher disclaims that he had

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[19/] In a 1997 deposition, Howlett stated that he informed Belcher of the Forms 211 submitted by the Miller brothers. (Howlett Dep. at 343-44.) In a 1998 affidavit, Howlett stated that he "assumes" he informed Belcher about the existence of the Forms 211. (Howlett Aff. at 4.)

knowledge of the Forms 211 during the trial. (Belcher Aff. at 1.) There is no proof in the record that would contradict Belcher's assertion as to the state of his knowledge as of the time of the trial. The Court finds no indication, circumstantial or otherwise, that Belcher asked any questions at trial with the expectation that a non-truthful response would be given. Therefore, Defendant cannot support his claim that Belcher knowingly elicited perjured testimony with regard to deals made with witnesses.

Turning to Defendant's other argued elicitation of false testimony, Defendant claims that Belcher knowingly elicited false testimony from Agent Howlett when the prosecutor asked him if he had received any ledgers in the course of his investigation of MSC.[20/]

[20/] The issue of missing documents was first raised in a motion to compel filed by Defendant on January 14, 1994, which alleged *journals*, not ledgers, for the years 1987 and 1988 had not been produced. (R. at 94.) Soon after, the conflation of the terms "journals" and "ledgers" began.

After a hearing before the Magistrate Judge, Defendant was ordered to amend his motion to include a clear and concise list of documents which had not been made available. Defendant supplemented his original request referring to the documents sought as both "cash disbursement ledgers," "check disbursement journals," "journals," and "ledgers." (R. at 121, pp. 15-16.) Affidavits of Don Sweat, John Kenworthy, Sally Demoulin, Wanda Benson, and Larry Willis were filed as exhibits to the original motion (R. at 94) alleging that only portions of journals had been produced and were not in their original form.

Defendant withdrew the motion to compel on March 29, 1994, after former MSC attorney Neal Pendergraft revealed the presence of ten boxes of files at his office, including journals for the year 1985. At that time,

defense counsel also discovered that Pendergraft and his staff had disassembled the original ledgers for the years 1987 and 1988, and reassembled and delivered them in incomplete form to the IRS. The notice of withdrawal further related counsel's discovery that Larry Willis, contrary to his affidavit that journals for the years 1985-1988 were turned over, had only turned over journals for the year 1986 to the IRS. Defendant noted that although portions of "journals" were still missing, he could not, in good faith, continue to allege that the missing journals were previously provided to the IRS. (R. at 128, pp. 3-4.) The motion to compel was withdrawn over the objection of the United States.

The confusing interchange of the terms ledger and journal continued throughout Defendant's trial, with Agent Howlett, first testifying that no journals were turned over, then correcting the testimony to state that no ledgers were turned over by Defendant. (Tr. at 694, 700.) Howlett also testified that according to a letter he received from attorney Pendergraft, ledgers did not exist. (Tr. at 694.) Howlett testified that he first received one box of journals for 1986 on March 28, 1990. (Tr. at 696.) He later received copies of microfilms for the years 1987 ad 1988, and original journals consisting of 759 marked pages for year 1986, 638 marked pages for year 1987, and 434 marked pages for year 1988. (Tr. at 697, 700.)

Victoria Larison, a witness for the defense, testified that a 1987 journal admitted into evidence was a ledger, admitting that she called them both ledgers and journals. (Tr. at 2013.) The affidavits of prosecutor Belcher and Agent Howlett document Howlett's propensity to use the terms ledger and journal interchangeably. (Gov't's Response; Ex. 1, Ex. 6.)

Larry Willis admitted delivering records to the IRS for their investigation, (Tr. at 1554.) Willis testified that ledgers for the years 1985-1988 were prepared by MSC and were turned over *if* requested by the IRS. However, he had difficulty recalling specifically how many boxes of records and what information was turned over. (Tr. at 1554.) Willis also testified that he had no personal knowledge that ledgers were turned over to the IRS and admitted that the receipt Beauregard signed did not reference ledgers. (Tr. at 1573-75, 1706.) Willis also testified that he could create

With respect to the 1986 ledgers, Howlett testified that he did not remember seeing them and that it would take "pretty well an extended period of time" to determine what they were. (Tr. at 843.) Howlett testified that he was unable to say whether the 1986 ledgers were in his office when copies were made by Don Sweat and other people. (Tr. at 844.) The record reflects that the specific documents presented were not marked for identification or admitted as evidence. (Tr. at 833, 843, 845.) The record is unclear whether the documents were reviewed by prosecutor Belcher, although he asked for that opportunity. (Tr. at 844.) Dickstein's affidavit (App. at 145) relates that the documents Bates stamped 000001-000722 are the ones he showed to Howlett, although they appear to have a few more pages.

On redirect examination, Belcher proceeded as follows:

Belcher: Do you recall being present, Mr. Howlett, when representatives of Mr. Alamo came to

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ledgers from the journals admitted into evidence at trial and that the absence of ledgers did not impede accounting. (Tr. at 1633.) Willis admitted that about 150 boxes of records had not been given to the IRS. (Tr. at 1691.)

In light of the confusing manner in which the terms ledger and journal were used throughout this litigation, Defendant is overly harsh in referring to the revision of chronologies by the government before submission to the defense as conscious removal and expungement. This is particularly true where the only ledgers which Defendant has discovered to be in the government's possession are documents which former defense counsel admits he possessed and showed to Agent Howlett. (App. to Reply at 142.)

Nashville to copy journals and other documents that were in the government's possession in connection with the discovery in this case?

Howlett: Yes, sir.

Belcher: Were the documents that Mr. Dickstein showed you a few minutes ago made available for copying at that time to the best of your knowledge?

Howlett: I don't remember them being in anything that we had.

Belcher: Do you recall as you sit there on the stand under oath seeing any ledgers in this case?

Howlett: No, I do not.

Belcher: Other than the ones you have there?

Howlett: No.

Belcher: If those indeed are ledgers. Do those copies appear to have been made last year or can you tell?

Dickstein: Objection, Your Honor, expertise. Calls for an expert opinion.

The Court: Well let's see if he can answer it. I think under 701 the question is can he answer it.

Belcher: Yes, sir. If you can tell, can you describe whether the documents Mr. Dickstein gave you appear to have been recently done or whether they appear to have been copies made several years ago?

Dickstein: Continuing objection, Your Honor.

Belcher: Based on your perception of those

documents.

The Court: I will allow him under 701 to the degree that he can answer.

Belcher: Can you say, sir?

Howlett: I don't have any way of knowing.

(Tr.at 849-51.)

Although Howlett testified the IRS received no ledgers, he was clearly mistaken, and when confronted with the 1986 ledgers admitted that they were ledgers, even though he did not remember seeing the documents before or whether they were available for copying when Defendant's representatives made copies. He was not given the opportunity he testified would be necessary to determine what the documents were. However, defense counsel did not pursue questioning of Howlett on this issue based upon his misgivings surrounding Defendant's own witnesses. The testimony which was elicited by Belcher merely reiterated that Howlett did not recall seeing any ledgers, was unable to say if those documents were in his possession when Defendant's representatives made copies, and could not say when the copies were made.

The subsequent ability of Defendant to substantiate the presence of the 1986 ledger in documents copied by his representatives[21/] merely demonstrates that Howlett was mistaken on this issue, not that his testimony was false. Defendant also fails to demonstrate that prosecutor Belcher

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[21/] The Court again noted that Defendant's own misconduct in failing to turn over documents to the IRS along with false affidavits previously provided by witnesses and church members prevented counsel from demonstrating that Howlett was mistaken.

knew that any false testimony was elicited at trial. Accordingly, Defendant's claim that any false testimony was elicited must fail.

Defendant's issues are all without merit. Thus, he cannot establish that he was deprived of a fair trial. The motion is DENIED.

III. POSSIBLE APPEAL

Consideration must also be given to issues that may occur if the defendant files a notice of appeal. Twenty-eight U.S.C. § 2253(a) requires the district court to evaluate the appealability of its decision denying a § 2255 motion.[22/] Section 2255 now incorporates the old habeas procedure of issuing or denying a certificate of probable cause, now renamed a certificate of appealability. No § 2255 movant may appeal without this certificate.

Lyons v. *Ohio Adult Parole Auth.*, 105 F.3d 1063 (6th Cir. 1997), *overruled in part by Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997), held that district judges may issue certificates of appealability under the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996). *See Lyons*, 105 F.3d at 1073. The Court also held that AEDPA codifies in amended 28 U.S.C. § 2253 the standard for issuing a certificate of probable cause found in prior § 2253,

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[22/] Title I of the AEDPA substantially revised the habeas statutes, including 28 U.S.C. §§ 2244, 2253, and 2255. Among other provisions, this Act amends 28 U.S.C. § 2244(b) and 2255 to require the district court to dismiss any subsequent § 2255 motion case absent permission from the court of appeals.

which was essentially a codification of *Barefoot* v. *Estelle*, 463 U.S. 880, 893 (1983). *See Lyons*, 105 F.3d at 1073.

> [P]robable cause requires something more than the absence of frivolity . . . and the standard for issuance of a certificate of probable cause is a higher one than the 'good faith' requirement of § 1915. . . . [A] certificate of probable cause requires petitioner to make a substantial showing of the denial of [a] federal right. [A] question of some substance, or a substantial showing of the denial of [a] federal right, obviously [does not require] the petitioner [to] show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.

Barefoot, 463 U.S. at 893 (internal quotations and citations omitted). In this case, for the reasons discussed in the body of this order, the movant's claims are clearly without merit and he cannot present a question of some substance about which reasonable jurists could differ. The Court therefore denies a certificate of appealability.

The Prison Litigation Reform Act of 1995 (PLRA), Title VIII of Pub. L. 104-134, 110 Stat. 1321 (Apr. 24, 1996), does not apply to appeals of orders denying § 2255 motions. *See Hereford* v. *United States*, 117 F.3d 949, 951 (6th Cir. 1997); *cf. McGore* v. *Wrigglesworth*, 114 F.3d 601, 610 (6th Cir. 1997) (instructing courts regarding proper PLRA procedures in

prisoner civil-rights cases). Rather, to seek leae to appeal *in forma pauperis* in a § 2255 case, and thereby avoid the $105 filing fee required by 28 U.S.C. §§ 1913 and 1917,[23] the prisoner must seek permission from the district court under Rule 24(a) of the Federal Rules of Appellate Procedure (F.R.A.P.). *See Hereford*, 117 F.3d at 952. If the motion is denied, the prisoner may renew the motion in the appellate court.

F.R.A.P. 24(a) states, in pertinent part that:

> A party to an action in a district court who desires to proceed on appeal *in forma pauperis* shall file in the district court a motion for leave to so proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal.

The Rule further requires the district court to certify in writing whether the appeal is taken in good faith. For the same reasons

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[23] The fee for docketing an appeal is $100. *See* Judicial Conference Schedule of Fees, ¶ 1, Note following 28 U.S.C. § 1913. Under 28 U.S.C. § 1917, a district court also charges a $5 fee:

> Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or of a writ of certiorari $5 shall be paid to the clerk of the district court, by the appellant or petitioner.

the Court denies a certificate of appealability, the Court determines that any appeal in this case would not be taken in good faith. It is therefore certified, pursuant to F.R.A.P. 24(a), that any appeal in this matter by the Defendant is not taken in good faith, and he may not proceed on appeal *in forma pauperis*.

SO ORDERED this 13th day of May, 1999.

/s/ Jon Phipps McCalla
JON PHIPPS McCALLA
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Cv. No. 98-2323-M1/A
Cr. No. 93-20103-M1

UNITED STATES OF AMERICA,
Plaintiff,

v.

BERNIE LAZAR HOFFMAN, a/k/a/ TONY ALAMO,
Defendant.

Order Denying Defendant's Motion for Reconsideration

On May 24, 1999, Defendant filed a motion for reconsideration of the Court's order denying Defendant's motion under 28 U.S.C. § 2255. Plaintiff filed an answer in opposition to Defendant's motion for reconsideration on July 29, 1999. For the reasons set forth below, Defendant's motion is DENIED.

BACKGROUND

On April 19, 1993, Defendant was indicted for one court

of filing a false income tax return for the year 1985 (count one), in violation of 26 U.S.C. § 7206(1), and three counts of failing to file an income tax return for the years 1986 (count two), 1987 (count three), and 1988 (count four), in violation of 26 U.S.C. § 7203. These charges arose from Defendant's operation of various businesses placed in the name of Music Square Church (MSC), a tax-exempt entity. Between May 16, 1994 and June 6, 1994, the Court presided at a jury trial.

At trial, the government contended that Defendant was the owner in fact of the various businesses and that the income from those businesses should have been reported on his personal tax returns. In the alternative, the government contended that if MSC was the true owner of the businesses, Defendant diverted funds from MSC and businesses for his own personal use and benefit. For count one, the government was required to prove that Defendant made and signed a materially false return and that he knew the return substantially understated his gross income. That Defendant signed the 1985 return under the penalty of perjury was not disputed. For the remaining counts, the government was required to prove that Defendant received gross income greater than the statutory filing requirement for each year, that he did not file a return, and that the failure to file was willful.

Defendant contended that he was operating a tax exempt organization for the purposes of his ministry , did not know his 1985 return was materially false, and had no gross income over the filing requirement for the years 1986-88.

The government presented evidence and the testimony of twenty-eight witnesses during its case in chief on the issues of Defendant's ownership and control of the businesses and his

income. Two of those witnesses were hostile witnesses. The government also presented the testimony of three rebuttal witnesses. Defendant testified in his own defense and presented evidence and the testimony of fourteen additional witnesses. Both sides presented the expert testimony of certified public accountants on the issue of income.

The trial concluded with the jury finding Defendant guilty on all four counts. Between September 9, 1994 and September 16, 1994, the Court conducted a sentencing hearing, and on September 30, 1994, entered a total sentence of seventy-two months.[1/]

STANDARD

"Motions under Rule 59(e) must either clearly establish a manifest error of law or must present newly discovered evidence." *Sault Ste. Marie Tribe of Chippewa Indians* v. *Engler*, 146 F.3d 367, 374 (6th Cir. 1998) (quotation omitted). "A motion under Rule 59(e) is not an opportunity to re-argue a case." *Id.* The granting of a motion to amend a judgment under Rule 59(e) is within the sound discretion of the trial court. *See McMahon* v. *Libbey-Owens-Ford Co.*, 870 F.2d 1073, 1078 (6th Cir. 1989); *Huff* v. *Metropolitan Life Ins. Co.*, 675 F.2d 119, 122 (6th Cir. 1982).

[1/] The Court imposed a sentence of thirty-six months on count one, and a sentence of twelve months on court two, to be served consecutively to count one. The Court imposed consecutive twelve month sentences on counts three and four, to be served consecutively to the sentences imposed for counts one and two.

DISCUSSION

In his § 2255 motion, Defendant argued that his convictions should be set aside, contending that his right to due process was violated in part when the prosecution failed to disclose the existence of two IRS Forms 211 applications for reward submitted by government witnesses Robert and Carey Miller.[2/]

Under *Brady* v. *Maryland*, 373 U.S. 83 (1963), the government must disclose to a criminal defendant evidence that is both favorable to him and material to guilt or punishment. However, "[n]o *Brady* violation exists where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available to [a] defendant from another source." *United States* v. *Clark*, 928 F.2d 733, 738 (6th Cir. 1991) (per curiam) (omitting internal quotation); *see also Coe* v. *Bell*, 161 F.3d 320, 344 (6th Cir. 1998) (observing that *Brady* "obviously does not apply to information that is not wholly within the control of the prosecution"); *United States* v. *O'Dell*, 805 F.2d 637, 641 (6th Cir. 1986) (noting that other circuits have "determined that the prosecution is under no duty to produce evidence that is available to a defendant").

Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine

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[2/] A Form 211 application for reward money is contingent on the Government convicting the defendant and recovering back taxes, fines, and penalties.

confidence in the outcome." *Bagley*, 473 U.S. 667, 682 (1985).

In his § 2255 motion, Defendant stated that evidence relating to the submission of Forms 211 by the Millers in the initial stages of the Government's investigation of Alamo and MSC was not disclosed to Defendant and was only recently discovered during the course of discovery in the *Music Square Church* v. *United States* case, which is before the United States Court of Federal Claims.

Defendant elicited testimony from Agent Larry Howlett that the Millers submitted Forms 211 in conjunction with a March, 1990 meeting regarding provision of information by the Millers in the IRS investigations. Defendant supplemented his claim that the Millers submitted Forms 211 with 1991 affidavits of Carey Miller and Peter Georgiades, the Millers' attorney, and Georgiades' petition for attorneys' fees; these documents were filed in an unrelated lawsuit in 1991. *See Tony and Susan Alamo Found., Inc.* v. *United States*, No. 3:90-0901, 1992 WL 235873 (M.D. Tenn. July 13, 1992).[3/]

[3/] Carey Miller's May 20, 1991 affidavit stated:

> Mr. Beauregard, Mr. Howlett and Mr. Daniel Brauwieler [sic], an attorney for IRS from Dallas, Texas, met with me and my attorney, Peter Georgiades, in Mr. Georgiades' hotel room in Fort Smith, Arkansas. After filling out forms (IRS Form 211's) to apply for a reward for information leading to conviction of Mr. Alamo, and with our permission, Mr. Georgiades gave these IRS agents information about how Mr. Alamo operated, the names and locations of potential witnesses, and other information.

C. Miller Aff. at 5. The affidavit further states that the affiant was subsequently visited by Mr. Brauweiler and another IRS attorney in August,

Defendant pointed to two aspects of Carey Miller's testimony that he argued were not corroborated by other witnesses: that Defendant ordered church members to alter records of the corporation and create false corporate resolutions, and that the reason for Defendant's transferring ownership of the church's property from the Tony and Susan Alamo Foundation to its successor, Music Square Church, was to avoid IRS seizure of the property. Defendant's contention was that evidence of the completion and filing of Forms 211 by the Miller brothers constituted material impeachment evidence which was required to have been disclosed to the defense prior to trial.

The Court in its order denying Defendant's § 2255 motion found that, even assuming that Plaintiff could demonstrate the materiality of the non-disclosed evidence, which issue the Court expressly did not resolve, an independent ground for finding that the withholding of the Forms 211 was not a

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1990, at which time the affiant asked Brauweiler whether the IRS had precessed his Form 211. Mr. Brauwieler [sic], however, would only refer me to Mr. Howlett and Mr. Beauregard to the answers to my questions." C. Miller Aff. at 6.

In a May 29, 1991 affidavit, Georgiades stated: "After the hearing on March 6-7, 1990, Mr. Howlett, Mr. Beauregard and Mr. Brauweiler all came to my hotel room, at which time we gave Mr. Beauregard an executed IRS Form 211 'Application for Reward for Original Information.'" Georgiades Aff. at 4.

The government supplied the Court with affidavits from Beauregard, Brauweiler, and Georgiades stating that they did not recall Forms 211 being completed by the Miller brothers. These affidavits were sworn to in October or November, 1998.

violation of *Brady* was that Defendant had not offered proof that the defense did not know of the Forms 211 at the time of trial. In response, Defendant has on motion for reconsideration offered an affidavit from Defendant's trial attorney, Jeffrey Dickstein, clarifying that at no time prior to Mr. Alamo's conviction did Dickstein have knowledge that the Miller brothers had completed Forms 211.

However, Defendant has still failed to show that the evidence now claimed to be newly discovered was not available to the defendant from another source. As the Court previously observed:

> A review of the docket sheet of *Tony and Susan Alamo Foundation* reveals that the Foundation was represented from the initial stages of the litigation by attorney Neal Pendergraft, who provided files during the initial stages of Defendant's criminal prosecution. The court records also reflect that Tony Alamo individually intervened in that action on October 25, 1991. Alamo's counsel was Dickstein. Although the affidavits of Carey Miller and Peter Georgiades were filed on May 21, 1991, the issue of Georgiades' attorneys' fees was litigated long after the intervention of Alamo and the affidavits were in the court record. That matter was concluded well before the criminal trial here occurred. The evidence with regard to the Forms 211 which Defendant claims is newly discovered was part of the public record in a civil case in which Defendant and his counsel were involved prior to the criminal prosecution underlying this case.

Defendant cannot show that this evidence was unavailable to him. On this basis alone the Court is justified in denying Defendant's motion for reconsideration.

Moreover, the Court answers a question left expressly unresolved in its order denying Defendant's § 2255 motion and finds that Plaintiff has not demonstrated the materiality of the non-disclosed evidence. There is not a reasonable probability that, had the possible submission of the Forms 211 been disclosed to Defendant, the result of the proceeding would have been different. As the Court observed in its previous order: "It is less than clear . . . that the possible completion of the Forms 211 by the Miller brothers in 1991 would have been impeaching by 1994. The 1991 affidavits do not reflect the changing positions of the Millers who, by the time this case was tried in 1994, were in direct competition with the IRS for Alamo's assets and were attempting to collect a judgment against Alamo for over one million dollars." In the absence of evidence regarding the Millers' possible submission of the Forms 211, the Court finds that Defendant still received a fair trial. Therefore, the Court finds that the evidence was not material to Defendant's guilt or punishment.

Accordingly, the Court finds no *Brady* violation in connection with the non-disclosure of the Forms 211 because the evidence both was available to Defendant from another source and was immaterial.

CONCLUSION

For the reasons set forth above, Defendant's motion for reconsideration is DENIED.

SO ORDERED this 11th day of August, 1999.

/s/ Jon Phipps McCalla
JON PHIPPS McCALLA
United States District Judge

APPENDIX E
STATUTES AND RULE INVOLVED

28 U.S.C. § 2253 provides:

Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing

required by paragraph (2).

28 U.S.C. § 2255 provides:

Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled

Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Federal Rule 22 of Appellate Procedure provides:

Habeas Corpus and Section 2255 Proceedings

(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.